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South Dakota Public Utilities Commission

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March 9, 2001

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Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: In the Matter of Western Wireless Corporation
Petition for Designation as an Eligible
Telecommunications Carrier for the Pine
Ridge Reservation in South Dakota
Federal-State Joint Board on Universal Service
Docket No. 96-45/

Dear Ms. Salas:

Enclosed for filing you will find original and four copies of Comments of South Dakota Public Utilities Commission Opposing Western Wireless Corporation's Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota with reference to the above captioned matter.

Very truly yours,

Rolayne Ailts Wiest

Rolayne Ailts Wiest
Special Assistant Attorney General

RAW:dk
Enc.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAR 12 2001

In the Matter of

WESTERN WIRELESS CORPORATION

Petition For Designation as an
Eligible Telecommunications Carrier for the
Pine Ridge Reservation in South Dakota

Federal-State Joint Board on Universal Service

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FCC MAIL ROOM

) CC Docket
) No. 96-45
)
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COMMENTS OF SOUTH DAKOTA PUBLIC UTILITIES COMMISSION OPPOSING
WESTERN WIRELESS CORPORATION'S PETITION FOR DESIGNATION AS AN
ELIGIBLE TELECOMMUNICATIONS CARRIER FOR THE PINE RIDGE
RESERVATION IN SOUTH DAKOTA

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
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WESTERN WIRELESS CORPORATION)	
)	CC Docket
Petition For Designation as an)	No. 96-45
Eligible Telecommunications Carrier for the)	
Pine Ridge Reservation in South Dakota)	
)	
Federal-State Joint Board on Universal Service)	
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**COMMENTS OF SOUTH DAKOTA PUBLIC UTILITIES COMMISSION OPPOSING
WESTERN WIRELESS CORPORATION'S PETITION FOR DESIGNATION AS AN
ELIGIBLE TELECOMMUNICATIONS CARRIER FOR THE PINE RIDGE
RESERVATION IN SOUTH DAKOTA**

On January 19, 2001, Western Wireless Corporation (Western Wireless) filed with the Federal Communications Commission (FCC) a Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota. In its petition, Western Wireless stated that it should be granted eligible telecommunications carrier (ETC) status for the Pine Ridge Reservation (Reservation) for the following reasons: (1) the South Dakota Public Utilities Commission (SDPUC) lacks jurisdiction over Western Wireless' provision of universal service on the reservation; (2) Western Wireless meets all of the requirements to be designated an ETC on the Reservation; and (3) the designation of Western Wireless as an ETC will advance the public interest. Western Wireless Petition at 1-2.

On February 2, 2001, the FCC released a Public Notice establishing a pleading cycle. DA 01-278. The FCC allowed interested parties to file comments 30 days after publication of the Public Notice. Comments are due March 12, 2001.

The SDPUC objects to the petition on three grounds: (1) Western Wireless is barred from seeking ETC status from the FCC because Western Wireless has already sought ETC status from the SDPUC for the Pine Ridge Reservation, as well as the rest of South Dakota; (2) the SDPUC has jurisdiction over Western Wireless' provision of universal service on the Pine Ridge Reservation; and (3) the FCC is prohibited from designating Western Wireless as an ETC for the Pine Ridge Reservation because the Reservation does not encompass the entire service areas of the incumbent rural local exchange companies. The SDPUC takes no position on whether Western Wireless meets the ETC requirements or whether the designation is in the public interest since those are issues that should be decided by the SDPUC.

I. WESTERN WIRELESS IS BARRED FROM REQUESTING ETC DESIGNATION FROM THE FCC FOR THE RESERVATION.

In its Twelfth Report and Order, the FCC established a designation process for carriers seeking ETC status on tribal lands. Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, CC Docket No. 96-45, FCC 00-208 (rel. June 30, 2000) ¶¶ 115-127, (hereafter Twelfth Report and Order). The FCC found that a carrier seeking ETC designation for tribal lands may petition the FCC for designation pursuant to section 214(e)(6), under certain circumstances, without first seeking designation

from the state commission. Id. at ¶ 115. The FCC concluded that it may determine whether a carrier is subject to a state commission's jurisdiction. Id. at ¶ 121. The burden of demonstrating that a carrier is not subject to the state commission's jurisdiction is on the carrier, not the state commission. Id. at ¶¶ 122-123.

However, the FCC placed limits on a carrier's ability to seek designation from the FCC. One of the limitations is that "a carrier may only avail itself of this process when it has not initiated a designation proceeding before the affected state commission." Id. at ¶ 126. The FCC declared that it "will not make a jurisdictional determination under section 214(e)(6) if the affected state commission has initiated a proceeding in response to a designation request under section 214(e)(2)." Id. The FCC's reason for this limitation is "to avoid the potential for 'forum-shopping' and the costs and confusion caused by a duplication of efforts between this Commission and state commissions. . . ." Id.

This limitation bars the present petition because GCC License Corporation (GCC)¹ has already filed for ETC status with

¹ The SDPUC notes that the petition in this case was filed by Western Wireless. The SDPUC assumes that Western Wireless must have undergone some type of restructuring since the SDPUC was told at its hearing that GCC is the entity that does business in South Dakota and is the licensee in South Dakota. At the time of the hearing in South Dakota, Western Wireless was the parent corporation of GCC.

the SDPUC for the entire state of South Dakota.² The SDPUC denied the application for several reasons. See In the Matter of the Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, Findings of Fact and Conclusions of Law; Notice of Entry of Order, Docket TC98-146, issued May 19, 1999 (hereafter referred to as "SDPUC's Decision") (attached as Appendix A).

GCC appealed this denial and the SDPUC's Decision was reversed by the state circuit court. See The Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, TC98-146 (S.D. PUC May 19, 1999), rev'd Findings of Fact, Conclusions of Law, and Order, Civ. 99-235 (S.D. Sixth Jud. Cir. March 22, 2000), appeal filed (S.D. May 10, 2000). The case is currently on appeal before the South Dakota Supreme Court. If the reversal is upheld, the case will come back to the SDPUC for a decision on whether it is in the public interest to designate Western Wireless as an ETC in areas served by rural telephone companies.³ Since Western Wireless has already petitioned the SDPUC for ETC status on the Pine Ridge

² In the proceeding before the SDPUC, GCC never claimed that the SDPUC lacked jurisdiction over GCC's proposal to provision universal service on reservations located in South Dakota.

³ The majority of the Pine Ridge Reservation is currently served by Golden West Telecommunications Cooperative, Inc., a rural telephone company. It is the Commission's understanding that smaller parts of the reservation are served by Fort Randall Telephone Company and Great Plains Communications (Nebraska).

Reservation, as well as the rest of the state, Western Wireless is barred from petitioning the FCC.

Western Wireless attempts to circumvent the clear language found in the FCC's Twelfth Report and Order by claiming that its service offering on the Reservation "differs substantially from its proposed offering for the rest of South Dakota. The Tate Woglaka Offering proposed in this Petition for the Pine Ridge Reservation is completely distinct and separate from the offering at issue in the Petition filed with the South Dakota PUC."⁴

The SDPUC disagrees. The SDPUC points out that Western Wireless' offering of a fixed wireless local loop service through its cellular network facilities and spectrum is the same service it was proposing to offer throughout South Dakota. See Appendix A, SDPUC Decision at 2, Finding of Fact 8. Further, Western Wireless' Service Agreement with the Oglala Sioux Tribe has no bearing on whether Western Wireless' offering complies with ETC requirements.⁵ Although Western Wireless states that it "has agreed to grant the tribe a substantial role in the scope, planning, design and provision of universal service targeted to

⁴ Western Wireless Petition at 18. The SDPUC notes that Western Wireless has failed to include this service agreement in its petition. Instead it provided a one page summary of the agreement. Western Wireless Petition, Appendix B.

⁵ The services required to be provided by an ETC are: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equivalent; (4) single-party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers. 47 C.F.R. § 54.101(a).

the Pine Ridge Reservation," that does not change the fact that, if granted ETC status, Western Wireless is the carrier responsible for providing universal service to the people living on the Reservation.⁶

In addition, Western Wireless should not be allowed to skirt the forum-shopping concerns of this Commission by petitioning for a smaller area than it petitioned the state commission. By asking the state commission to designate the entire state, and then, if denied, petitioning the FCC for designation for a smaller area, the carrier is engaging in forum-shopping.

Western Wireless further claims that its provision of service on the Reservation "differs from its universal service offerings elsewhere in another critical manner -- it is subject to the Tribe's jurisdiction." Western Wireless Petition at 6. However, Western Wireless' agreement to be subject to the Tribe's jurisdiction does not mean that the entity that actually has jurisdiction, i.e. the SDPUC, is stripped of its jurisdiction.⁷ Moreover, agreeing to be subject to the Tribe's jurisdiction does nothing to alleviate forum-shopping concerns, nor does it alleviate the costs and confusion caused by the FCC and the state

⁶ The SDPUC also finds it quite interesting that Western Wireless has filed unserved area applications with the FCC for construction of three cell sites to serve the Pine Ridge Reservation. See Western Wireless Petition at 7, fn. 10. GCC testified at the SDPUC hearing that it had all of the equipment in place that was necessary to provide universal service throughout the state if the existing ETCs relinquished their ETC designations. Appendix B, Transcript pages of hearing before the SDPUC, pages 63-65, testimony of GCC witness Gene DeJordy.

⁷ See argument II.

commission duplicating their efforts. In short, it has no bearing on whether the carrier has already filed before the state commission and is, therefore, barred from seeking designation from the FCC.

In a case very similar to the facts presented here, the FCC dismissed a cellular carrier's request for designation as an ETC for tribal lands. In that case, a non-tribally-owned cellular carrier, filed a petition seeking ETC designation from the FCC for federally reserved Indian lands in Arizona and New Mexico. Twelfth Report and Order, ¶ 141. Prior to that filing, the carrier had filed requests for ETC designations with the Arizona and New Mexico Commissions. Id. Based on the FCC's finding that it would not consider ETC petitions if the carrier had already filed with the state commission, the FCC dismissed the carrier's request. Id. at ¶ 143. The FCC found that "in order to avoid the possibility of forum-shopping and costs and confusion caused by a duplication of efforts between this Commission and state commissions, we decline to address a designation request under section 214(e)(6) if a request for eligible telecommunications carrier designation is pending at the state commission." Id.

Western Wireless admits that it has not withdrawn its ETC petition for a universal service offering in South Dakota but claims that "the instant Petition would be necessary regardless of the ultimate outcome of the South Dakota PUC proceeding. Thus, Western Wireless has not engaged in any 'forum shopping' by filing the instant Petition with the FCC." Western Wireless

Petition at 19. The SDPUC is at a loss to understand why, if Western Wireless were granted ETC status throughout the entire state of South Dakota by the SDPUC, Western Wireless would then need to seek designation as an ETC for the Pine Ridge Reservation from the FCC. The presence of a service agreement with the Reservation hardly necessitates Western Wireless to seek a "double" ETC designation.

In fact, this Commission has already ruled that no such "double" designation is needed, nor will it be granted. Twelfth Report and Order, ¶ 149. In that case, the Cheyenne River Sioux Tribe Telephone Authority (CRSTTA) requested that the FCC confirm the SDPUC's designation of CRSTTA as an ETC. Id. at ¶ 148. The FCC declined, finding that a carrier that has already been designated as an ETC by a state commission is not required to receive the same designation from the Commission. Id. at ¶ 149.

The simple fact is that if the SDPUC had granted Western Wireless ETC status throughout South Dakota, Western Wireless would not now be before the FCC seeking ETC status for its provisioning of service on the Pine Ridge Reservation. The fact that Western Wireless *is* before the FCC seeking ETC status despite its filing for the same area before the SDPUC, demonstrates that Western Wireless is, indeed, engaging in impermissible forum-shopping.

**II. THE SDPUC HAS JURISDICTION OVER WESTERN WIRELESS'
PROVISION OF SERVICE ON THE PINE RIDGE
RESERVATION.**

In this case, Western Wireless, a non-Indian national carrier, seeks a ruling from the FCC that it is exempt from the jurisdiction of the SDPUC in Shannon County and south Jackson County (comprising the Pine Ridge Reservation). Western Wireless apparently admits that it is subject to state jurisdiction at other places within the state of South Dakota but seeks a ruling that the county and one-half area constitutes an area beyond state jurisdiction.

Western Wireless seeks relief pursuant to 47 U.S.C. § 214(e)(6). The FCC has rejected the contention that this section "provides the Commission with blanket authority to make all eligible telecommunications carrier designations over carriers providing service on tribal lands." Twelfth Report and Order ¶ 122. The Commission has "emphasize[d]" that the burden faced by Western Wireless is a "strict burden and that generalized assertions regarding the state commission's lack of jurisdiction will not suffice" Id. The Commission has also declined "to place on the affected state commission the burden of proving that it has jurisdiction over a particular carrier." Id. ¶ 123. The Commission has recognized that the issue of state commission jurisdiction within tribal lands is a "particularized inquiry, and thus specific to each state. . . ." Id. Thus, Western Wireless has not met the strict test.

The leading case in determining whether state jurisdiction over a non-Indian person or entity on a reservation has been preempted is White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). In Bracker, the Court said, with regard to cases involving the conduct of non-Indians engaging in activity on the reservation:

In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

Id. at 145. See generally J. Mazurek, American Indian Law Deskbook 122-29 (2d ed. 1998) (analyzing state jurisdiction on reservations).

A. Federal Interest.

Western Wireless has apparently conceded that federal law, per se, does not weigh in favor of its claim. Western Wireless does not cite any statutory support for its contention that Western Wireless is exempt from SDPUC jurisdiction. In contrast, in White Mountain Apache Tribe v. Bracker, the case which Western Wireless and SDPUC both agree is the leading case, direct federal statutory and administrative action led to the finding of preemption. In Bracker, the Court considered whether the state could impose motor carrier license and use fuel taxes on a logging company which operated only on BIA roads on a reservation. The Court found the pervasive regulation of Indian

timber by the BIA led to the finding of preemption. It stated, for example, that "we observe that the Federal Government's regulation of the harvesting of Indian timber is comprehensive." Bracker, 448 U.S. at 145. The Court noted that "Federal policies with respect to Indian timber have a long history." Id. at 146 n.12. The Court further cited the "detailed set of regulations" regarding the sale of timber, the advertising of timber sales, the manner in which bids for the Indian timber might be accepted or rejected, the circumstances in which Indian timber contracts might be entered into, the requirement of approval for Indian timber contracts by the secretary, fire protective measures with regard to Indian timber, and the appeals mechanism which was established with regard to Indian timber matters. Id. at 147. The Court noted "[u]nder these regulations, the Bureau of Indian Affairs exercises literally daily supervision over the harvesting and management of tribal timber." Id.

Of course, there is no such detailed federal regulation of Indian telecommunications.⁸ Indeed, there is virtually no history of federal scrutiny or of "daily oversight" or any oversight of Indian telecommunications. Thus, the decisive factor in Bracker which deprived the state of jurisdiction to tax is not present in the case now before the Commission. This alone should dispose of the reliance of Western Wireless on Bracker.⁹

⁸ The FCC regulates interstate telecommunications but has not undertaken detailed federal regulation of telecommunications services provided within Indian country.

⁹ See also as exemplars of cases in which tribal jurisdiction can be found, California v. Cabazon Band of Mission Indians, 480 U.S. 202, 217-19 (1987) (tribal jurisdiction where there was tribal development of gaming

B. The State Interest in Regulating Western Wireless Is Extensive and Is Embodied in Its Law.

The state of South Dakota has a strong interest in continuing to regulate telecommunication carriers within Shannon and south Jackson County, which constitute the Pine Ridge Reservation.

First, the state's regulation of Western Wireless provides the benefits of the regulation to all citizens, including both tribal members and nonmembers who are citizens of the state of South Dakota who live in Shannon and south Jackson County. The benefits of the South Dakota Constitution and its laws are, of course, intended for all of its citizens. See, e.g., S.D. Const. preamble. Indeed, federal law commands that state law benefits be made available to Indians and non-Indians alike, even Indians within Indian country. See Chase v. McMasters, 573 F.2d 1011 (8th Cir. 1978).

Second, the benefits which the state of South Dakota can provide through regulation to all of its citizens, including those in Shannon and south Jackson County, are extensive, and the state has a strong interest in continuance of those benefits. Western Wireless contends that the state has only "limited regulatory authority over wireless carriers." See Western Wireless Petition at 16. This statement is simply wrong. South Dakota defines a telecommunications service at SDCL 49-31-1(27) so as to include the services Western Wireless wishes to offer.

enterprises pursuant to federally approved tribal ordinances and management contracts); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 327 (1983) (tribal jurisdiction where there was a concerted federal and tribal development of wildlife resources).

As such, Western Wireless is clearly a telecommunications company under SDCL 49-31-1(26) subject to the general panoply of state regulatory authority. See Cheyenne River Sioux Tribe Telephone Authority v. PUC, 595 N.W.2d 604, 609 (S.D. 1999) ("The authority of PUC is extensive and crucial to the overall regulatory scheme. See SDCL ch. 49-31.").

The SDPUC has been granted ample rule-making authority, to regulate telecommunications which is easily comparable to the Indian timber authority exercised by the United States in Bracker. SDCL 49-31-77, for example, specifically grants the SDPUC authority to "establish service quality standards for local exchange services." SDCL 49-31-85 provides that any regulation of telecommunications services by the SDPUC shall be "fair, reasonable, nondiscriminatory and applicable to all telecommunications carriers providing service in the state." It adds that the SDPUC must establish "quality of service standards" by a statutory rule-making plan.

The FCC can take judicial notice of the extensive exercise of this rule-making authority in South Dakota. One example of the exercise of the rulemaking authority is found in ARSD Chapter 20:10:33, which sets out the quality of service requirements. ARSD 20:10:33:02 provides that a local exchange company must provide "satisfactory transmission and reception." ARSD 20:10:33:07 provides that the telephone plant must be designed and maintained subject to applicable electric safety codes and in accordance with accepted good engineering practices of the telecommunications services. The telecommunications company is

further required to show documentation of sufficient equipment and adequate personnel, ARSD 20:10:33:09; to keep records of tests and inspections for a minimum of two years, ARSD 20:10:33:12; to employ prudent management and planning practices, ARSD 20:10:33:13; to keep its plant and equipment in a good state of repair consistent with safe and adequate performance, ARSD 20:10:33:15; to provide for emergency planning, ARSD 20:10:33:17; to schedule service interruptions at a time that causes minimal inconvenience to customers, ARSD 20:10:33:22; to be able to receive trouble reports on a seven-day-a-week twenty-four-hour basis, ARSD 20:10:33:24; and to immediately report when 911 service is disrupted or impaired, ARSD 20:10:33:27.

Thus, the state not only has an interest in providing comprehensive regulations to benefit all customers of telecommunications companies in South Dakota, Indian and non-Indian, but has carried that obligation into practice through regulations such as those set out in ARSD Chapter 20:10:33, and as set out in SDCL ch. 49-31. See Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 185 (1989) (upholding state authority to impose tax and noting substantial state services provided on reservation).¹⁰

We note that Western Wireless attempts to minimize the state's authority over wireless carriers. See Western Wireless

¹⁰ The state supplies a wide variety of other government services on reservations, including social services, roads, disaster services, and state education funding. The state, for example, provided over 4.8 million dollars to the Shannon County School District in FY 1999 alone school year. Department of Education & Cultural Affairs, Education in South Dakota, 1998-99, at 220.

Petition, at 16. The apparent reference is to the position of Western Wireless that its plan of operation in the Shannon and south Jackson County area will not be subject to the state's entry requirements or the state's rate making because it is, Western presumably believes, exempt under 47 U.S.C. § 332(c). Western Wireless neglects to note that the issue of whether a provider of fixed wireless local loop services is a mobile carrier is now pending before the FCC. See In the Matter of the State Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service, Petition for Declaratory Ruling, WT Docket 00-239 (filed November 3, 2000). If the FCC decides a fixed wireless local loop provider is not a mobile carrier, the state's argument above will be all the stronger for its regulatory authority will include, in addition, to all the matters set forth above, control over entry and control over rate making. The argument above nonetheless assumes, for the sake of this argument alone, that the FCC will decide otherwise. As can be seen, the state's exercised authority is quite broad regardless of the outcome of that case before this Commission.

Beyond the interest of the state in providing good service to all Indians and non-Indians within Shannon and south Jackson County, there are other state interests at stake. Thus, the state has a strong interest in being able to continue to designate any telecommunications company as an ETC. The state's ability to develop uniform standards for telecommunications

within the state is dependent upon its ability to control the recipients of ETC funds. The state has already designated incumbent local exchange companies as ETCs within the very area in which Western Wireless seeks to operate.¹¹ It would be anomalous indeed if authority were seen to be lodged in the FCC, instead of the SDPUC, to grant another carrier ETC designation within the same area.

Moreover, the state has a strong interest in maintaining quality telecommunications within Shannon and south Jackson County for the reason that calls will be placed from those counties to areas within the state outside those counties. It would be a severe detriment to the state should the quality of service decline within the area such that telecommunications to subscribers within the area also decline. See Rice v. Rehner, 463 U.S. 713, 724 (1983) (liquor sold by tribal members for off-premises consumption could easily find its way off the reservation).

The state has other similar interests. The state has a strong interest, as set out in SDCL 49-31-11, in preventing discrimination in the provision of telecommunications. SDCL 49-31-11 provides that no telecommunications company "may unjustly or unreasonably discriminate between persons in providing telecommunications services or in the rate or price charged for those services."

¹¹ Nine separate federally recognized Indian tribes are located within South Dakota. The SDPUC has designated one or more local exchange companies as ETCs for each Indian country area controlled by each tribe.

Moreover, a critical part of the regulatory authority of the SDPUC is its ability to hear complaints regarding "anything done or omitted by any telecommunications company." SDCL 49-13-1. Upon the making of any complaint, the Commission may cause an investigation to be made, SDCL 49-13-4, may hold proceedings on the record with regard to the complaint, and may issue orders to cease and desist in the case of telecommunications wrongs. See SDCL 49-13-7; SDCL 49-13-13. Furthermore, the telecommunications company may be liable for damages, including double liability and attorneys fees. See SDCL 49-13-14.1. The ability of a patron to take a case before a neutral administrative agency is an invaluable service provided by the state of South Dakota to all telecommunications users.

C. The Tribal Interest, as Reflected in Federal Law, Is Insufficient to Displace State Jurisdiction.

The tribe has not, itself, identified its interest in this matter. Western Wireless, however, has identified the factors it believes support the tribal interest. First, Western Wireless apparently perceives that because it has entered into a contract with the tribe, the tribe has achieved an insurmountable interest under federal law in displacing state jurisdiction. This, of course, is not the case. As a general matter, an individual or a company may not displace state jurisdiction by the simple expedient of somehow consenting to tribal jurisdiction. In a similar case, the South Dakota Supreme Court held that a contract for purchase of an exchange between a tribe and U.S. West was dependent upon approval of the sale by the SDPUC "not upon the consensual agreement between U.S. West and [the tribal telephone

exchange]."
Cheyenne River Sioux Tribe Telephone Authority, 595 N.W.2d at 610. The Court therefore held that the exercise of SDPUC jurisdiction did not infringe upon the tribe's right to make its own laws and be ruled by them.¹²

Second, Western Wireless seems to argue that because it has entered into a close arrangement with the Oglala Sioux Tribe to provide certain services, that state jurisdiction should be preempted. Western Wireless Petition at 13-15. Western Wireless has not, however, indicated why its arrangement with the tribe is necessarily in conflict with SDPUC jurisdiction. Certainly a telephone company may have a special arrangement with an entity off reservation and still be subject to SDPUC authority. Western Wireless has simply not demonstrated why this is so different.

Furthermore, SDPUC notes that there is no assertion in the materials offered by Western Wireless that the tribe has crystallized its interest in regulating Western Wireless in a comprehensive, effective regulatory arrangement. Indeed, for all that appears in the paper submitted by Western Wireless, it will be unregulated if SDPUC regulation is forfeited in this proceeding. Certainly no evidence of an independent tribal PUC is set forth by Western Wireless.

¹² Id. See also In the Matter of the Application of Otter Tail Power Co., 451 N.W.2d 95 (N.D. 1990). The Otter Tail court rejected a similar "consent" argument. Otter Tail involved a dispute between two electric companies as to which company had the right to provide electrical service to tribal facilities on the reservation. The court stated that "[v]iewing the relationship between a supplier and consumer of electricity as merely a 'consensual relationship' undifferentiated from other types of commercial transactions ignores the nature of the electric utility business." 451 N.W. 2d at 104.

Finally, Western Wireless seems to argue that state jurisdiction over Western Wireless should be preempted because most of the potential customers will be Native Americans. Western Wireless first misses the point of the purpose of civil regulatory authority: the question is not whether potential customers are Native Americans, but whether they are members of the Oglala Sioux Tribe. See United States v. South Dakota, 105 F.3d 1552, 1559-60 (8th Cir. 1997). The failure of Western Wireless to identify the actual number of members of the Oglala Sioux Tribe undercuts the factual basis of any argument it might wish to make. In any event, even were it to be conceded that most of the persons within the county and one-half area comprising the Pine Ridge Reservation were members of the Oglala Sioux Tribe, its relevance is questionable. Western Wireless points to no authority which suggests that the outcome of the Bracker test is to be determined on the basis of a census, even a census which accurately distinguishes between members of the Oglala Sioux Tribe and all others. Indeed, Bracker, 448 U.S. at 145, specifically warned against a "mechanical" test.

As set forth above, Western Wireless undertook a heavy burden in attempting to oust the state of South Dakota with regard to its jurisdiction over it. Analysis of the Bracker test indicates that neither the federal nor the tribal factor weighs heavily in the direction of Western Wireless's argument, while the state interest prong of the argument weighs heavily against Western Wireless's position. The outcome, therefore, is that the Bracker balancing test indicates that state of South Dakota

retains its jurisdiction over this non-Indian national telecommunications provider.

III. THE FCC IS BARRED FROM DESIGNATING WESTERN WIRELESS AS AN ETC FOR THE RESERVATION BECAUSE THE RESERVATION DOES NOT ENCOMPASS THE ENTIRE SERVICE AREAS OF THE INCUMBENT RURAL LOCAL EXCHANGE COMPANIES.

Even if this Commission were to determine that the SDPUC lacked jurisdiction and that this Petition was not barred by the fact that Western Wireless has already petitioned the SDPUC to serve the Pine Ridge Reservation, the Commission would still be prohibited from designating Western Wireless as an ETC for an area that encompasses parts of three incumbent rural telephone companies' service areas. As explained below, a condition precedent for Western Wireless' designation as an ETC for the Pine Ridge Reservation is for the Commission and the SDPUC to adopt definitions of service areas that differ from the three incumbent rural telephone company's current study areas.

Pursuant to section 214(e)(5) of the 1996 Telecommunications Act, the service area for a rural telephone company "means such company's 'study area' unless and until the Commission and the states, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company."¹³ The Commission subsequently issued a rule implementing this section. *See* 47 C.F.R. § 54.207.

¹³ In accordance with federal law, the SDPUC designated each incumbent rural telephone company as an ETC and designated each rural company's study area as its service area.

This rule provides two ways for changing a rural telephone company's service area. A state commission may propose "to define a service area served by a rural telephone company to be other than such company's study area" by filing a petition with the FCC. 47 C.F.R. § 54.207(c). Or, the FCC "may, on its own motion, initiate a proceeding to consider a definition of a service area served by a rural telephone company that is different from that company's study area. If it proposes such different definition, the Commission shall seek the agreement of the state commission. . . ." 47 C.F.R. § 54.207(d). This section further provides that the FCC's "proposed definition shall not take effect until both the state commission and the Commission agree upon the definition of a rural service area. . . ." 47 C.F.R. § 54.207(d)(2).

In its Universal Service Order, this Commission concurred with the Joint Board that a competitive carrier must serve the incumbent rural telephone company's study area. The Commission stated:

We agree with the Joint Board that, if competitors, as a condition of eligibility, must provide services throughout a rural telephone company's study area, the competitors will not be able to target only the customers that are the least expensive to serve and thus undercut the ILEC's ability to provide service throughout the area. In addition, we agree with the Joint Board that this decision is consistent with our decision to use a rural ILEC's embedded costs to determine, at least initially, that company's costs of providing universal service because rural telephone companies currently average such costs at the study-area level.

Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776, 8881, ¶ 189 (1997).

In 1999, the Commission granted a petition from the Washington Utilities and Transportation Commission which sought to change rural telephone companies' service areas. See In the Matter of Petition for Agreement with Designation of Rural Company Eligible Telecommunications Carrier Service Areas and for Approval of the Use of Disaggregation of Study Areas for the Purpose of Distributing Portable Federal Universal Service Support, CC Docket No. 96-45, DA 99-1844 (released Sept. 9, 1999). In that decision, the Commission listed the Joint Board's reasons for retaining, at least initially, the study areas of rural telephone companies as their service areas and then explained the reasons why the Washington Commission's proposal to redefine the rural telephone companies' service areas addressed the Joint Board's concerns:

First, the Joint Board suggested that retaining study areas would minimize potential "cream skimming," because competitors would be required, as a condition of eligibility, to provide service throughout the rural telephone company's study area. The Commission expressed its agreement with this analysis in adopting the Joint Board's recommendations regarding the study areas of rural carriers. Second, the Joint Board noted that the 1996 Act places rural telephone companies on a different footing from other local exchange companies, making allowances for considerations of administrative, technical and economical feasibility. Finally, the Joint Board expressed concern that determining embedded costs on a basis other than study areas would impose an administrative burden on rural companies. We conclude that petitioners have taken these concerns into account in crafting the proposed methodology for disaggregating and redistributing support currently distributed on a study area basis. In particular, this methodology is designed to address opportunities for "cream skimming" by competitors. Moreover, to the extent the Joint Board was concerned about the interests of rural companies, we find it significant that the rural LEC petitioners support the proposed service area